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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 281

LOCAL 776, IATSE (FILM EDITORS),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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LOCAL 776, IATSE (FILM EDITORS),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Motion Picture Film Editors, Local 776 of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 10, 1962, granting enforcement, as modified and interpreted by said Court's opinion, of an order issued by the Respondent National Labor Relations Board against your Petitioner on September 4, 1959 and denying a cross-petition to review said order.

Opinions Below.

The Decision and Order of the Respondent Board in Case No. 21-CB-1199 of that agency's docket [R. 8-14]* and the accompanying Trial Examiner's Intermediate Report and Recommended Order [R. 14-44]* are officially reported at 124 N. L. R. B. 842 (No. 105), and unofficially reported at 44 L. R. R. M. 1511 and C. C. H. Labor Law Reports (1959-60), Par. 56,643.

The Opinion containing the judgment of the United States Court of Appeals for the Ninth Circuit in Case No. 16,907 of its docket, which is not yet officially reported, is printed as Appendix B hereto, along with the resulting Decree Enforcing, as Modified, an Order of the National Labor Relations Board (Appendix C, *infra*). Said opinion is unofficially reported at 50 L. R. R. M. 2220 and 45 C. C. H. Labor Cases, Par. 17,624.

Jurisdiction.

Said opinion of the Court of Appeals was entered on May 10, 1962 and its decree in conformity therewith was entered on July 2, 1962. An order of the Court of Appeals was entered on June 1, 1962, staying the issuance of its mandate in this case pending the filing, consideration, and disposition by this Honorable Supreme Court of the within petition for a writ of certiorari, provided that the same is filed on or before August 1, 1962.

The jurisdiction of this Court to review the instant case is invoked under 28 U. S. C. §1254(1).

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*As provided by Rules 21(4) and 23(1)(i), nine copies of the record as printed for the use of the Court of Appeals, containing the Board's Decision and Trial Examiner's Intermediate Report are filed herewith.

Questions Presented.

1. Whether the last sentence of Section 10(b) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, prohibits the Respondent Board's admission and consideration of hearsay testimony regarding purported admissions by the Employer to the effect that he was discharging an employee because of Union pressure to support its findings in an unfair labor practice proceeding that a labor union violated Sections 8(b)(2) and 8(b)(1)(A) of said Act?

2. Whether, as a matter of law, it is prejudicial error amounting to denial of due process for the Respondent Board to rely upon incompetent hearsay testimony regarding purported admissions by the Employer to the effect that he was discharging an employee because of Union pressure in an unfair labor practice proceeding brought solely against a labor union for alleged violation of Sections 8(b)(2) and 8(b)(1)(A) of said Act, where no complaint was issued against such Employer for alleged violation of Section 8(a)(3)?

Statutory Provisions and Regulations Involved.

The relevant portions of the following statutory provisions and regulations involved in this case are printed verbatim as Appendix A, *infra*:

Sections 7, 8(a)(3), 8(b)(1)(A), 8(b)(2) and 10(b) of the National Labor Relations Act, as amended (61 Stat. 186, 65 Stat. 601, 72 Stat. 945, 29 U. S. C. §151, *et seq.*).

Section 7(c) of the Administrative Procedure Act (60 Stat. 237, as amended, 5 U. S. C. §1001, *et seq.*).

Section 102.39 of the Rules and Regulations and Section 101.10 of the Statements of Procedure, National Labor Relations Board, Series 2, (24 F. R. 9095).

Statement of the Case.

On May 17, 1960, the Respondent Board filed a petition for judicial enforcement of its order against Local 776, IATSE, your Petitioner herein, with the United States Court of Appeals for the Ninth Circuit [R. 209-210], which was followed by a cross-petition for judicial review of said order [R. 211-213], thereby invoking the statutory jurisdiction of the court below under Sections 10(e) and (f) of the National Labor Relations Act, as amended (29 U. S. C. §160, subds. (e) and (f)).

A. The Board Hearings.

On March 16-17, 1959, formal unfair labor practice hearings were held in this matter before the Respondent Board's Trial Examiner, David F. Doyle [R. 14; 45-191], to litigate the issues raised by the pleadings [R. 3-8] as to whether Local 776, IATSE (Film Editors), your Petitioner (hereinafter referred to as "Local 776" or "the Union"), violated Sections 8(b)(1)(A) and (2) of the Act by causing Cascade Pictures of California, Inc. (hereinafter referred to as "Cascade" or "the Employer"), to discharge its employee, Henry A. Carlson, the individual charging party, for lack of union membership.

The "relatively brief" verbal testimony offered by the Board's General Counsel in support of his complaint came from three witnesses [R. 18]:

(1) *Henry A. Carlson*, the charging party and alleged discriminatee [R. 47-83; *Cf.* Int. Rept. at R. 18-23];

(2) *Bernard Loftus,* his general supervisor [R. 102-133; *Cf.* Int. Rept. at R. 24-28];

(3) *Lester Selson,* his immediate supervisor [R. 83-101; *Cf.* Int. Rept. at R. 23-24].

On one basic and essential element of the General Counsel's case, his proof consisted of *hearsay testimony* admitted over objections by counsel for Local 776, concerning alleged conversations between *Carlson and Selson* [R. 52; 55-57; 58; 85] and between *Carlson and Loftus* [R. 53-55] which supposed conversations took place outside the presence of any Union officer, agent or representative.

So far as is material to the consideration of the questions presented by the instant petition for a writ of certiorari, the critical hearsay testimony offered by the General Counsel to support his contention that "Cascade pictures discharged Mr. Carlson because of [the] Union's request to so discharge him" [R. 47] consisted of the charging party's uncorroborated testimony received over objection, that in a telephone conversation* shortly before Carlson's discharge *"Mr. Loftus said he was very sorry, that he had the Union on his back, and he was forced to let me go by the end of the week."* [R. 54-55. For Loftus' denial that he made the statement and that there was any "union pressure or threat or anything of that sort," see R. 112-115]. Coupled with this critical hearsay testimony, the Trial Examiner also permitted Carlson and Selson both to testify over

*The Trial Examiner mistakenly found contrary to the record that Loftus "called Carlson to his office" for this conversation [R. 19-20], but the Board shrugged this off as a "minor inaccuracy." [R. 10, footnote 3.]

objection, in an almost classic example of hearsay twice-removed, that about ten minutes after the above-mentioned purported Carlson-Loftus telephone conversation, Carlson told Selson, his immediate supervisor, that he had been informed by Loftus that he was to be replaced because he was "not in good standing with the Local" [R. 55-56; 85; and 97-98].

In addition to several other concededly erroneous rulings as to admission of evidence at this formal hearing,** Trial Examiner Doyle not only overruled the objections by counsel for Local 776 to this critical hearsay testimony, subject to a later motion to strike, but after granting Local 776 permission to present such a motion to strike the challenged hearsay testimony in its post-hearing brief [R. 135-138], denied that motion in his Intermediate Report [R. 31-32].

B. The Intermediate Report.

On May 12, 1959, Trial Examiner Doyle issued his Intermediate Report [R. 14-144] which concluded that "the General Counsel has proven by a preponderance of the evidence that the Union caused the discharge of Carlson in violation of Section 8(b)(1)(A) and (2) of the Act as alleged in the complaint" [R. 38; see also Conclusions of Law Nos. 3-5, incl., at R. 40]. In reaching this conclusion, the Trial Examiner accepted all of Carlson's testimony, including the inadmissible

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**For example, the Board and the Court of Appeals found that the Trial Examiner probably erred in admitting Loftus' pre-hearing statement as substantive evidence, contrary to the rule in *N.L.R.B. v. Quest-Shon Mark Brassiere Co., Inc.*, 185 F. 2d 285 (2d Cir., 1950). [R. 9, footnote 2; Opinion, Appendix B, p. 14.] The Court of Appeals also found, contrary to the Board that the Trial Examiner's ruling admitting so-called "background evidence" was error.

hearsay; gave "limited" weight to Selson's testimony; and refused to credit much of Loftus' testimony [R. 33-34].

As observed by Circuit Judge Koelsch in the opinion of the court below (Appendix B, *infra*, p. 6), Trial Examiner Doyle "acknowledged in his Intermediate Report that there was no direct proof of [the Union's] complicity in the dismissal", but "was of the opinion that the record manifested an 'implicit' demand by [the Union] upon Cascade to discharge Carlson."

In his Intermediate Report finding Local 776 guilty of 8(b)(1)(A) and 8(b)(2) violations as charged by Carlson, the Trial Examiner thus relied in large part upon the following duly-challenged portions of "the record":

(1) Carlson's uncorroborated remote "background evidence", receipt of which the Court of Appeals found "was error" [R. 18-19, 31, and 35];

(2) The excerpt from Loftus' pre-hearing statement which the Court of Appeals and the Board both found "could not be used to establish the truth of the fact stated" [R. 26-28 and 32];

(3) Carlson's uncorroborated hearsay testimony that Loftus told him over the telephone that "he had the Union on his back" [R. 20, 31-32, and 34];

(4) The hearsay testimony of Carlson and Selson that the former had immediately reported his telephone conversation with Loftus to the latter [R. 20, 23, and 31-32].

In denying the motion of Local 776 to strike the hearsay testimony as to Carlson's alleged conversations with

Loftus and Selson "taking place outside the Union's presence and without the Union's knowledge", the Trial Examiner stated in his Intermediate Report [R. 31-32]:

> "One of the essential elements of this cause of action is that Carlson was discharged by the Company in violation of Section 8(a)(3) of the Act. The alleged hearsay is all direct evidence addressed to establishing that point. The violation of Section 8(a)(3) by the Company is basic, to the further allegation, so vigorously opposed by counsel, that the Union attempted to cause and caused this discharge. Of course, the Union is not, and cannot be held responsible for the conduct of the Com-Company's officers, if they acted independently of the Union. However, the evidence relating to the conduct of Company officers is competent, relevant and essential to the General Counsel's cause of action. This motion is denied."

C. The Board Panel's Decision.

A three-member panel of the Respondent Board consisting of former Chairman Leedom, former Member Jenkins, and Member Rodgers, issued its decision on September 4, 1959 [R. 8-14]. After reviewing the challenged evidentiary rulings of the Trial Examiner to which exceptions had been duly taken by Local 776, the Board panel found that "no prejudicial error was committed" by the Trial Examiner in making such rulings. [R. 9, footnote 2 and text thereto].

Specifically as to the exception to the Trial Examiner's failure to strike the inadmissible hearsay testi-

mony "relating to conversations between Carlson and two Company representatives, Loftus and Selson", the Board panel stated in footnote 2 of its decision:

> ". . . The testimony was admitted, and relied upon by the Trial Examiner, not as evidence of the [Union's] efforts to cause Carlson's discharge, but for the limited purpose of establishing the Company's motive and reason for discharging Carlson. For that purpose, the testimony was clearly competent and material . . ."

The Board panel accepted and adopted the Trial Examiner's ultimate findings, conclusions and recommendations, [R. 10] likewise relying upon the questioned hearsay testimony to find that Local 776 had violated Sections 8(b)(2) and 8(b)(1)(A) by causing Carlson's employer to discharge him for lack of union membership.

D. Decision of the Court Below.

In granting enforcement, as modified, of the Respondent Board's order against Local 776 and denying its cross-petition for review, the Court of Appeals upheld your Petitioner's attack on the form of the Board order as "excessive in scope", but rejected attacks by counsel for Local 776 on the validity of the Board order based upon the grounds of "insufficiency of the evidence to support the critical finding" and "error in the admission of evidence, prejudicial to the Union" (Appendix B, *infra*, pp. 6 and 15).

Circuit Judge Koelsch, on behalf of the Court below, expressly relies in his opinion on Carlson's testimony that "*Mr. Loftus said he was very sorry, that he had the Union on his back and he was forced to let me go by the end of the week*" as part of the evidence in the record supporting the Board's "factual conclusion" of an 8(b)(2) violation by Local 776 as being "neither unreasonable nor too tenuous to stand", noting that Webster's Dictionary defines the term "*on one's back*" as "assailing or weighing upon one". (Opinion, footnote 4 and text thereto; Appendix B, *infra*, p. 8.)

While conceding that this purported Loftus' statement was "*hearsay*" as to Local 776 similar to testimony disapproved by this same Ninth Circuit Court of Appeals in *N. L. R. B. v. Amalgamated Meat Cutters*, 202 F. 2d 671 (9th Cir., 1953), the opinion of Circuit Judge Koelsch expressly approves the Board's reliance herein upon this "Loftus . . . statement to Carlson assigning union pressure as the basis for this action . . . even though he named no particular union". The opinion treats this admitted "hearsay" as competent evidence that Carlson was dismissed by Cascade solely because of his non-union status in violation of Section 8(a)(3) of the Act, which supports the further 8(b)(2) finding against Local 776 (Appendix B, *infra*, pp. 8 and 10).

In specifically reviewing the rulings of the Trial Examiner and the Board regarding the admission over objections of Carlson's testimony and other similar hear-

say testimony given by the witness Selson as to this purported Loftus' statement, the Court of Appeals rejected your Petitioner's argument that "such alleged conversations might constitute 'direct evidence' in an 8(a)(3) proceeding against the Company, but constitute objectionable hearsay when introduced against the Union to prove the truth of the statements supposedly made by the employer in an 8(b)(2) case". In so doing, the opinion of Circuit Judge Koelsch declared—

> ". . . this argument overlooks the nature of the violation charged and the limited purpose for which the proof was admitted . . . the charge that the union caused the employer to discharge his employee is 'derivative' and thus required proof, if it was to be sustained, of the employer's unlawful discrimination against its employee, as well as proof that a particular labor organization caused the employer to so discriminate. (citing cases) In this proceeding the testimony was admitted by the trial examiner and considered by both him and the Board not to prove [the Union's] coercion of employer discrimination but solely to establish the fact that Cascade had engaged in conduct which would violate section 8(a)(3). So limited, the admission and consideration of the testimony was proper."

REASONS FOR GRANTING THE WRIT.

1. The Questions Presented Herein Are of Great Importance in the Administration of Sections 8(b)(2) and 10(b) of the Amended National Labor Relations Act.

With the passage of Title I of the Taft-Hartley Act in 1947 (61 Stat. 136), Congress not only amended the Wagner Act of 1935 (49 Stat. 454) to create a new "unfair labor practice" in Section 8(b)(2) forbidding a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee" for lack of union membership in violation of Section 8(a)(3). In 1947, Congress also amended the last sentence of Section 10(b) of the Act with respect to the "rules of evidence" applicable to "unfair labor practice" proceedings.

The instant decision of the Ninth Circuit Court of Appeals misconstrues Section 8(b)(2) as authorizing a "*derivative*" charge that a labor union caused an employer to discriminatorily discharge his employee and on this mistaken basis expressly holds, without regard to the evidentiary requirements of Section 10(b) as amended, that hearsay evidence as to employer admissions are competent "to establish the fact that [the employer] had engaged in conduct which would violate section 8(a)(3)" in an 8(b)(2) proceeding solely against a labor union.

Under "the more liberal original wording of Section 10(b) of the National Labor Relations Act" (see *N. L. R. B. v. Imparato Stevedoring Corp.*, 250 F. 2d 297 (3rd Cir., 1957), footnote 4 and text thereto)—

> "In any such [unfair labor practice] proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." (49 Stat. 454.)

In 1946, Congress adopted Section 7(c) of the Administrative Procedure Act (60 Stat. 241, 5 U. S. C. §1006(c)) applicable to "unfair labor practice" proceedings, providing that "Any oral or documentary evidence may be received . . ." but expressly declaring that "no sanction shall be imposed or . . . order issued except . . ." as supported by and in accordance with the reliable, probative and substantial evidence".

In 1947, as disclosed by the legislative history of the Taft-Hartley Act (Conference Report No. 510, 80th Cong., 1st Sess., p. 56, 2 Leg. Hist., LMRA 560, quoted by the opinion of Circuit Judge Allen in *Pittsburgh Steamship Co. v. N. L. R. B.*, 180 F. 2d 731 (6th Cir., 1950), aff'd 340 U. S. 498), Congress adopted provisions amending the above-quoted portion of Section 10(b) of the Wagner Act to "insure the Board's receiving only legal evidence" and imposing "a duty" upon the Courts of Appeal to "see that the Board observes the provisions" of the amended last sentence of Section 10(b) which now specifically states that—

> "Any such [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure . . ."

As Senator Taft pointed out at the time, the Senate accepted the House bill's language containing this amendment as a "preventative measure" requiring the Board and its trial examiners "generally to follow the rules of evidence prevailing in the courts" rather than "accepting literally anything into the record" and reverting to earlier "widespread abuses of its latitude in

admitting evidence in . . . Board proceedings". (2 Leg. Hist., LMRA 1542 and 1625). Thus, Congress recognized that this and other such statutory requirements would *"in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met"*; also, that "If the Board is required, so far as practicable, to act only on legal evidence, the substituting, for example, of assumed 'expertness' for evidence will no longer be possible." (Conference Report No. 510, 80th Cong., 1st Sess., pp. 53 and 56; 2 Leg. Hist., LMRA, pp. 557 and 560).

In its decision authorizing the Respondent Board to revert in 8(b)(2) cases against labor unions under the Taft-Hartley Act to its "earlier habit" prevailing in 8(3) cases against employers under the Wagner Act which Senator Taft called "indefensible" (2 Leg. Hist., LMRA 1625), *i.e.*, the "irresponsible admission and weighing of hearsay" (House Report No. 1902, 76th Cong., 3rd Sess., p. 76; see *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474), the Ninth Circuit Court of Appeals in this instant case has raised important questions of Federal law. Contrary to the Sixth Circuit, the Ninth Circuit now apparently refuses to recognize that ". . . the rules concerning evidence have been expressly changed by both the Taft-Hartley Act and the Administrative Procedure Act" and that the "new and emphatic" rules laid down by Section 7(c) of the Administrative Procedure Act taken together with

the amendments made by Section 10(b) of the Taft-Hartley Act "were designed to eliminate the wholesale use of hearsay" which is "wholly incompetent testimony" (such as "hearsay testimony" that an employee was discharged for a reason related to his union status) as "the basis of important findings" by the National Labor Relations Board (*Pittsburgh Steamship Co. v. N. L. R. B., supra*).

The instant decision of the Ninth Circuit Court of Appeals thus involves "an important phase of the administration of the National Labor Relations Act" and questions of public importance concerning the validity of the Board's order which goes far beyond the "fair assessment of a record on the issue of unsubstantiality" and warrants granting certiorari herein (*N. L. R. B. v. Pittsburgh S.S. Co.*, 340 U. S. 498, 499, 502; *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 149; *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 134).

As the last-cited case correctly states (312 U. S. at p. 155, emphasis added), ". . . it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies *in the absence of a statutory requirement* that such rules are to be observed", but the instant case raises the important question as to whether or not the changes made in the last sentence of Section 10(b) of the Act constitute a meaningful statutory requirement of this sort.

As Professor Forkosch wrote in his *Treatise on Administrative Law* (Bobbs-Merrill Company (1956), pp. 350-351):

> "The legalistic jury-trial rules of evidence, in the absence of a statutory requirement do not apply in administrative proceedings . . . but . . . a statutory requirement may be present. For example, what do provisions such as those found in the original 1935 and later 1947 amendments to [Section 10(b) of] the Wagner Act mean . . . Superficially this change in language should presage a much stricter agency policy concerning admission of evidence at least for this Board, but apparently this has not occurred."

"The Board's regulations do no more than repeat the statutory language." (*N. L. R. B. v. Imparato Stevedoring Corp., supra,* footnote 3; see Section 102.39 of the Board's Rules and Regulations and Section 101.10(a) of the Board's Statements of Procedure, 29 F. R. 9095, reproduced in Appendix A, *infra,* at pp. 3-4). The Ninth Circuit Court's opinion in this case does not cite or discuss the statutory language nor the Board's regulations. Only an authoritative opinion of his Honorable Supreme Court can settle these important questions regarding the rules of evidence applicable to "unfair labor practice proceedings" under Section 10(b) of the Act.

2. The Ninth Circuit Court of Appeals Has Misconstrued and Misapplied the Opinions of This Supreme Court in the Radio Officers and Consolidated Edison Cases.

In the opinion of the court below, Circuit Judge Koelsch cites the opinion of this Supreme Court in *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, at p. 53 and cases in accord therewith (*i.e.*, the Ninth Circuit's opinion in *N. L. R. B. v. International Longshoremen's & Warehousemen's Union*, 210 F. 2d 581 (9th Cir., 1954), and *N. L. R. B. v. Local 57, etc.*, 201 F. 2d 771 (1st Cir., 1953)) for the proposition that proof of unlawful discrimination against an employee in violation of Section 8(a)(3) is required to support an 8(b)(2) finding against the particular labor union charged with causing an employer to so discriminate, even where the employer is not or cannot be included as a party to the Board proceedings.

To be sure the *Radio Officers'* case stated that the National Labor Relations Board could proceed against the union alone under Section 8(b)(2) which "requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate §8(2)(3)." However, nothing in that decision by this Supreme Court warrants its construction or application so as to hold that required proof of the employer's commission of an unfair labor practice in an 8(b)(2) proceeding may include hearsay testimony of employer admissions which are not binding against the union which is the sole party respondent before the Board.

The opinion of the Ninth Circuit Court of Appeals herein cites and quotes in footnote 3 from the opinion of this Supreme Court in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, stating that there—

> ". . . the Supreme Court defined the term 'Substantial evidence' as '. . . . more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'."

For some inexplicable reason the Ninth Circuit's opinion totally disregards those aspects of the 1938 *Consolidated Edison* decision touching directly upon the validity of an objection that "the Board received 'remote hearsay' and 'mere rumor' . . ." in the light of the 1935 Wagner Act version of Section 10(b) which then provided that court rules of evidence "shall not be controlling" (305 U. S. at pp. 229-230).

In the just-cited portion of its opinion in *Consolidated Edison* this Supreme Court specifically interpreted the last sentence of Section 10(b) of the National Labor Relations Act as it read in 1938 in the following oft-quoted language:

> "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order (citing such cases as *Interstate Commerce Commission v. Baird*, 194 U. S. 25; *Interstate Commerce Comm. v. Louisville & N. R. Co.*, 227 U. S. 88; and *United States v. Abilene & S. R. Co.*, 265 U. S. 274). But this

> assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

This Supreme Court disapproval of reliance upon "mere uncorroborated hearsay or rumor" in the *Consolidated Edison* case was quoted by Congressman Walter during the legislative debates preceding the adoption in Section 7(c) of the Administrative Procedure Act of the requirement that agency orders be "supported by and in accordance with" evidence which was not only "substantial" but also "reliable" and "probative." (92 Cong. Rec. 5653.) Under this 1946 Act it was thus intended that "The standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in non-administrative cases . . . ." (Senate Report No. 248, 79th Cong., 2nd Sess., p. 208.)

Congress was also aware when it adopted the Taft-Hartley Act in 1947 that, although *Consolidated Edison* declared that Board findings could not be based upon hearsay alone or upon hearsay corroborated by a mere scintilla, under the last sentence of Section 10(b) of the Wagner Act as construed in that case by this Supreme Court, and by Courts of Appeal like the Ninth Circuit in *N. L. R. B. v. American Potash and Chemical Corp.*, 98 F. 2d 488 (9th Cir., 1938), the fact that "some of the evidence was hearsay" was "no basis

for objection to the finding." Accordingly, in Section 10(b) of Title I of the Taft-Hartley Act, "Congress eliminated that language and substituted a provision that hearings 'shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States'." (*Pittsburgh Steamship Co. v. N. L. R. B., supra,* 180 F. 2d 731, aff'd, 340 U. S. 498.) By so doing, as Senator Morse pointed out during the Taft-Hartley Act debates (2 Leg. Hist., L. M. R. A. 1560), the 1947 legislation ". . . singles out the Board, among the agencies, for special treatment as to . . . the rules of evidence . . . contrary to . . . the statutes and rules of other agencies, like the Federal Trade Commission, and including the present [1935] National Labor Relations Act."

The instant decision by the Ninth Circuit Court of Appeals erroneously disregards the declaration of this Supreme Court in the *Consolidated Edison* case, *supra,* 305 U. S. at p. 229, that it was only the particular language of the last sentence of Section 10(b) of the 1935 statute—which Congress eliminated and replaced with a contrary rule in 1947—that previously freed the National Labor Relations Board from the compulsion of the rules of evidence applicable to judicial proceedings and formerly insulated Labor Board administrative orders from being invalidated because of reliance upon incompetent and judicially inadmissible hearsay.

3. The Important Questions Presented Herein Should Be Settled by This Supreme Court so as to Resolve the Existing Conflict of Decisions or Authorities.

It is well-settled in the Ninth Circuit, as in other Circuits, that ". . . apart from this provision of §10(b), in proceedings conforming to the requirements of the Administrative Procedure Act, agency findings cannot be based upon hearsay alone."

N. L. R. B. v. Amalgamated Meat Cutters, 202 F. 2d 671 (9th Cir., 1953), citing *Willapoint Oysters v. Ewing*, 174 F. 2d 675, 691 (9th Cir., 1949);

Del E. Webb Construction Co. v. N. L. R. B., 196 F. 2d 841, 846 (9th Cir., 1952);

Morrison-Knudsen Co. v. N. L. R. B., 276 F. 2d 63 (9th Cir., 1960).

Thus, Circuit Judge Koelsch, in the opinion for Circuit Judge Barnes, District Judge Yankwich and himself in the instant case, conceded that the above-cited *Amalgamated Meat Cutters* case would dictate a denial of the Respondent Board's petition for enforcement of its order if the record revealed no more than the testimony regarding the Loftus' statement to Carlson assigning union pressure as the basis for his discharge which was "hearsay as to [Local 776]."

The instant decision conflicts at least in principle with the *Amalgamated Meat Cutters* decision by Circuit Judges Pope, Healy and Orr of the Ninth Circuit and the Seventh Circuit's decision cited therein (*Superior Engraving Company v. N. L. R. B.*, 183 F. 2d 783, (7th Cir. 1950), reh. den., cert. den., 340 U. S. 930).

In *Amalgamated Meat Cutters*, the opinion by Circuit Judge Pope declared that, when Section 10(b) is taken into consideration, "hearsay evidence must be excluded from consideration by the Board and by us."

While *Superior Engraving* upheld the exclusion of inadmissible hearsay testimony by the Board's trial examiner in the case, it did so on the basis that Section 10(b) does ". . . require the Board to conduct its proceedings in accordance with the rules of evidence applicable in the district courts" and that obviously if the Board acted in disregard of the statutory directions in regard to the evidence upon which its findings must be based "an enforcement court would set aside its orders as arbitrary." On rehearing in *Superior Engraving*, the Seventh Circuit noted that Section 10(b) only required the Board to conduct unfair labor practice proceedings under court rules of evidence "so far as practicable" but observed that "The rule excluding hearsay is a basic rather than a technical rule."

The instant decision also conflicts at least in principle with the Ninth Circuit decision in *N. L. R. B. v. Haddock-Engineers, Ltd.*, 215 F. 2d 734 (9th Cir., 1954), which, on the authority of *Consolidated Edison v. N. L. R. B., supra*, 305 U. S. 197, 229-230; *N. L. R. B. v. Bell Oil & Gas Co.*, 98 F. 2d 406, reh. den. 98 F. 2d 870 (5th Cir., 1938); and *Pittsburgh Steamship Co. v. N. L. R. B., supra*, 180 F. 2d 731, 733 (6th Cir., 1950), held that hearsay as to an admission by a Company official does not constitute competent evidence supporting a Board order against a labor organization since "the Company is not the agent of the Union with power to make admissions for the Union."

The *Bell Oil & Gas Company* case was decided by the Fifth Circuit under the old Wagner Act Section 10(b). It held that there was nothing in the 1935 statute to indicate that an enforcement court should consider "incompetent evidence" merely because "Congress intended for the administrative and quasi-judicial proceedings before the Board to be free, within constitutional limitations, from the ordinary rules of evidence." On rehearing in that case, the Fifth Circuit recognized that under the old Section 10(b) of the 1935 Act "it is not error for the Board to hear incompetent evidence" but this "does not mean that a finding of fact may rest solely upon such evidence." Sixteen years later, in *N. L. R. B. v. Local Union 418*, 212 F. 2d 846 (C. A. 5th, 1954), this same Circuit Court, without citing the new Section 10(b) of the 1947 Act or even indirectly noting the change in the statutory language of the last sentence of that section, flatly stated that "Exact rules of evidence applied in court trials do not have to be followed in hearings before a trial examiner and it is sufficient if, from the whole case, there is substantial proof of the charges made in a proceeding of this kind."

The instant decision also conflicts in principle with the Ninth Circuit's decision in *N. L. R. B. v. Thomas Rigging Co.*, 211 F. 2d 154 (9th Cir., 1954), which refused enforcement of an 8(b)(2) order against a labor union and its business agent where the Board relied upon hearsay statements by a Company foreman to each of the alleged discriminatees that "he could not obtain employment unless he received clearance from the [Union] since such statements were "in no way binding" upon the labor union or its agent.

At least two other Circuit Courts of Appeal have been confronted with this important question as to administrative utilization of hearsay evidence in making National Labor Relations Board findings.

In *N. L. R. B. v. Carpet Layers Union, Local 419*, 213 F. 2d 49 (10th Cir., 1954), an alleged discriminatee was permitted to testify before the Labor Board that his general supervisor made statements to him that he knew his immediate supervisor received a call from a union agent requesting to take him off the job. The Board's 8(b)(2) order against the union was "challenged on the . . . ground that prejudicial error was committed by the trial examiner in admitting and considering secondary hearsay." Since, unlike the instant case, no reference was made to the hearsay testimony in the findings made by the trial examiner and later adopted by the Board and there was nothing in the record indicating that the hearsay was taken into consideration in making such findings, the Tenth Circuit found it "unnecessary" to explore the questions raised by this petition for certiorari to the Ninth Circuit herein.

The only Court of Appeals which has specifically alluded to the 1947 legislative change in the last sentence of Section 10(b) to hold that the "mere receipt of hearsay evidence . . . is not enough to require reversal" of a Board "unfair labor practice" order is the Third Circuit in *N. L. R. B. v. Imparato Stevedoring Corp., supra*, 250 F. 2d 297 (3rd Cir., 1957). There Circuit Judge McLaughlin cites this Supreme Court's *Consolidated Edison* decision under the original wording of Section 10(b) of the 1935 Wagner Act and the Ninth Circuit's *Willapoint Oysters* decision under Section

7(c) of the Administrative Procedure Act standing by itself in an effort to create a distinction between "uncorroborated hearsay" and "probative hearsay which is corroborated" in "the treatment of hearsay evidence" under Section 10(b) of Title I of the 1947 Taft-Hartley Act.

It is submitted that certiorari should be granted in the instant case "to resolve the conflict, the matter being of importance in the administration of the . . . Act." (*New York v. Saper*, 336 U. S. 328, 329.)

4. The Instant Court of Appeals' Decision Has so Far Sanctioned the Labor Board's Departure From the Basic Rules of Evidence as to Call for an Exercise of This Supreme Court's Power of Supervision.

Even in the case of administrative agencies which, unlike the National Labor Relations Board under the amended Section 10(b), are not bound by the rules of evidence applicable to judicial proceedings, "the more liberal the practice in admitting testimony, the more imperative to preserve the essential rules of evidence by which rights are asserted or defended."

Interstate Commerce Comm. v. Louisville & N.R. Co., 227 U. S. 88, 93;

Bridges v. Wixon, 326 U. S. 135, 154.

An administrative order must be held void which rests upon evidence which is improperly received and considered if this is "essential to the preservation of the substantial rights of the parties" and the "matter improperly treated as evidence may have been an important factor in the conclusions reached." (*United States v. Abilene and S. R. Co.*, 265 U. S. 274, 288).

Where "evidence was improperly received and where but for that evidence it is speculative whether the requisite finding would have been made" so that there has been a sanction imposed "without a fair hearing", the courts are under a duty to correct such arbitrary procedures (*Bridges v. Wixon, supra,* 326 U. S. at p. 156). Rules against admission of hearsay "are designed as safeguards against essentially unfair procedures" and "one is legally entitled to insist upon the observance of rules promulgated pursuant to law". (*Ibid.,* p. 152). "The deep-rooted policy of the law towards hearsay evidence cautions against such a loose reading of these fundamental procedural safeguards." (*Ibid.,* p. 152, footnote 6).

In the instant case the Court of Appeals has sanctioned the Respondent Board's reliance upon hearsay testimony of the charging individual as to purported statements by the employer as to the reason for his discharge to support a critical finding upon an essential element of the case against the labor union charged with a violation of Section 8(b)(2) and derivatively Section 8(b)(1)(A) of the Act. If this decision is permitted to stand, it will remain as judicial precedent which will subject every labor organization in the United States subject to the National Labor Relations Act as amended to 8(b)(2) proceedings before the Respondent Board in which such hearsay testimony as to employer statements can be used in evidence against it. Every discharged employee who is unsympathetic to the union and every employer who is unfriendly to the union will be a potential source of such hearsay testimony. The Trial Examiner, the Board, and the Court of Appeals in this case all relied upon Carlson's testimony

that Loftus told him he was being discharged because he *"had the Union on his back"*. Such a procedure is so manifestly unfair and contrary to the basic rules of evidence that this Supreme Court should exercise its power of supervision over such administrative and judicial proceedings to correct this obvious prejudicial error amounting to a denial of due process of law.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A.

Text of Statutory Provisions and Regulations Involved.

The relevant provisions of the *National Labor Relations Act, as amended* (61 Stat. 186, 65 Stat. 601, 72 Stat. 945, 29 U. S. C. §151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a). It shall be an unfair labor practice for an employer—. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: . . .;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of Subsection (a)(3). . . . .

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. . . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., Title 28, secs. 723-B, 723-C).

The relevant provisions of the *Administrative Procedure Act* (60 Stat. 237, as amended, 5 U. S. C. §1001, *et seq.*) are as follows:

HEARINGS

Sec. 7. In hearings which Sections 4 or 5 requires to be conducted pursuant to this section—

(c) *Evidence*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative and substantial evidence. . . .

The relevant provisions of the *Rules and Regulations* and *Statements of Procedure of the National Labor Relations Board, Series* 8 (24 F. R. 9095) are as follows:

RULES AND REGULATIONS

Sec. 102.39. *Rules of evidence controlling so far as practicable*—Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States, pursuant to the act of June 19, 1934 (U. S. C., Title 28, secs. 723-B, 723-C).

STATEMENTS OF PROCEDURE

Sec. 101.10. *Hearings.*—(a) . . . the rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. . . .

(b) . . . The Board's attorney has the burden of proof of violation of section 8 of the National Labor Relations Act. . . . In connection with hearings subject to the provisions of section 7 of the Administrative Procedure Act:

(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the preponderance of the reliable, probative, and substantial evidence.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Local 776, IATSE (Film Editors), Respondent.

Local 776 (Film Editors), Petitioner, vs. National Labor Relations Board, Respondent. No. 16,907. May 10, 1962.

Petition for Enforcement and Petition for Review of Order of the National Labor Relations Board.

Before: Barnes and Koelsch, Circuit Judges, and Yankwich, District Judge.

Koelsch, Circuit Judge:

The National Labor Relations Board found that Local 776, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereinafter "respondent"), violated section 8(b)(2) and 8(b)(1)(A) of the Labor Management Relations Act of 1947, by causing Cascade Pictures Co. of California, Inc. to discharge an employee, Henry A. Carlson, for lack of union membership.[1] The matter is now before the court on the

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[1]In pertinent part these sections provide that:

"Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 of this title: . . .; (2) to cause . . . an employer to discriminate against an employee in violation of subsection (a) (3) of this section . . ."

The relevant portion of Section 8 (a) (3) and of Section 7 referred to reads:

"Sec. 8 (a). It shall be unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment on any terms or conditions of employ-

Board's petition for enforcement of its ensuing order and Respondent's cross-petition to review that order.

Respondent objects to the granting of the relief sought by the Board and attacks the validity of the order on three grounds: (1) insufficiency of the evidence to support the critical finding; (2) error in the admission of evidence, prejudicial to the Union; and (3) the order is excessive in scope.

It should be noted with reference to the first of these three grounds that the questioned finding is predicated upon the commission of an unfair labor practice by Carlson's employer. If Cascade's act did not constitute a violation of section 8(a)(3) or if, although it was a violation, the dismissal of Carlson was not caused by respondent, then respondent was not guilty of an unfair labor practice under sections 8(b)(1)(A) and (2).[2]

The trial examiner acknowledged in his Intermediate Report that there was no direct proof of respondent's complicity in the dismissal; however, he was of the

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ment to encourage or discourage membership in any labor organization: . . ."

Sec. 7: "Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3) of this title."

[2]Carlson made no complaint against Cascade so the Board lacked authority to include the employer as a party. Radio Officers' Union v. NLRB, 347 U.S. 17, 53 (1954) (dictum); NLRB v. Local 57, Etc., 201 F.2d 771 (1st Cir. 1953).

opinion that the record manifested an "implicit" demand by respondent upon Cascade to discharge Carlson. Respondent readily recognizes the power of the Board to draw reasonable inferences and make other pertinent deductions from the evidence (Radio Officers' Union v. NLRB, 347 U. S. 17, 48-52 (1954)), but argues with much vigor that here this foundation is completely absent so that the finding is not "supported by substantial evidence on the record considered as a whole . . ." within the meaning of sections 10(e) and (f) of the Act.[3]

We have carefully considered the contention, keeping in mind that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight" (Universal Camera Corp. v. NLRB, 340 U.S. 474 at 488 (1951)), but nevertheless conclude that the Board's factual conclusion is neither unreasonable nor too tenuous to stand.

Cascade, Carlson's employer, was engaged in the branch of the motion picture industry that produces and distributes "television commercials"; it was party to a collective bargaining agreement covering employees who were engaged in "crafts and classifications of work over which . . . [a number of designated unions including the respondent] had jurisdiction." Carlson worked in the shipping department under the immediate supervision of one Selson; his particular job was

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[3]In Consolidated Edison Co. v. NLRB, 305 U.S. 197 the Supreme Court defined the term "Substantial evidence" as ". . . more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." However, evidence is not substantial if it appears adequate only in isolation; it must possess that quality when viewed in proper perspective. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

"to break the film down, put it on reels, label it and see that the paper work, bills of ladings [sic] and anything concerning its movement was correct and that it was carried out." He had been so employed for several weeks before Cascade learned that he was not a member of any union. But although Cascade considered his job "unorthodox" as compared with the type of work performed by any of its union-affiliated employees, it nevertheless inquired of respondent whether the job was governed by the existing collective bargaining agreement. Todd, respondent's assistant business agent, thereupon visited Cascade's plant where he discussed the matter with Bernard Loftus, Cascade's supervising editor who was in charge of employment. A few days later he notified Loftus that the job came under respondent's jurisdiction. Carlson testified that thereupon "Mr. Loftus said he was very sorry, that he had the Union on his back and he was forced to let me go by the end of the week."[4] Carlson's replacement, who was referred to Cascade by the respondent, was one of its members.

We are inclined to agree with respondent that if the matter had progressed no further and the record revealed no more than the conference between Loftus and respondent's agent, together with Carlson's discharge and Loftus' statement, hearsay as to respondent, then NLRB v. Amalgamated, 202 F. 2d 671 (9th Cir. 1953), which respondent urges upon us as "directly in point", would dictate a denial of the Board's petition. But such is not the situation. Respondent twice more ap-

[4]Webster's New International Dictionary (2nd ed. 1960) defines the term "on one's back" as "assailing or weighing upon one".

peared in the picture. Thus shortly after Carlson was given notice, Todd, at Selson's request, again came to the plant, where Selson explained that he particularly wanted to keep Carlson and asked whether that might be arranged. Carlson testified that during the meeting Todd observed that Cascade had itself to blame for any inconvenience due to the dismissal because "they should never had hired me in the first place because at the time I was hired the Union had members out of work." Todd further stated that the matter was one that would have to be considered by his superiors, and left. During the week Carlson visited Todd at the latter's offices. On that occasion, according to the witness, Todd advised him that Cascade had violated its contracts with respondent and was subject to a fine "but that the cause of [because of?] the unusual conditions as he called it, but [sic] they would not do that. He said for those reasons it would be necessary or better to discontinue my employment at Cascade. After that, he brought up that while the Union had no legal obligation to do anything for me he felt it was sort of a moral obligation to do something to make up for the job I had lost. And he was going to see that I would get a summer job. . . ."

As might be expected, there were numerous conflicts in the evidence, and Carlson's testimony was sometimes at variance with, and even at other times flatly contradicted by, the testimony of other witnesses, especially Todd. But the trial examiner resolved the conflicts in favor of the version given by Carlson, whom he fully credited, in preference to the facts asserted by the other witnesses; and the Board accepted and adopted his findings. There the matter must rest for

it is not for us to judge the credibility of witnesses; that is the function of the trier of fact. Universal Camera Corp. v. NLRB, supra.

That Cascade was guilty of an unfair labor practice under section 8(a)(3) of the Act appears beyond peradventure; Loftus flatly testified that "the sole reason" for Carlson's dismissal was the latter's nonunion status and his earlier statement to Carlson assigning union pressure as the basis for this action was to the same effect even though he named no particular union. It is, of course, true that the Act extends no protection against discharge to the employee who is incompetent, insubordinate or otherwise disqualified from continuing to work; but here all the proof was to the contrary and the efforts Cascade made to reinstate Carlson more than suggest his services were satisfactory. It is likewise true that the section 8(a)(3) of the Act extends only a limited protection to non-union members whose employers have entered into collective bargaining agreements containing union security clauses, for a proviso in that section of the Act permits the discharge of an employee who had not secured union membership within a specified time, usually thirty days after hiring, as an exception which may be asserted by way of defense to a charge of an unfair labor practice.[5] But here, respondent made no attempt to bring

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[5]The proviso referred to reads:

"That nothing contained in this subchapter or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the 30th day following the beginning of such employment or the effective date of such agreement, whichever is the later. . . ."

the discharge within that exception; it simply "plead the general issue" by putting the general counsel to his proof, or, to use respondent's statement appearing in its brief:

> "The defense offered by Local 776, as the Trial Examiner correctly observed, was that the Union did not request or otherwise do anything which made it responsible for causing Carlson's discharge and 'disassociates itself from this conduct of the Company.' "[6]

And the sequence of events, the fact that Carlson's job was taken by a member of respondent's union, the statements of Todd and his recognition of respondent's "moral obligation" to find Carlson work, are facts which together are persuasive that respondent played the prominent role in the affair. Employers are not in the habit of dismissing competent employees merely to replace them; this is especially true when the charge entails no little inconvenience and some expense. There must be some reason and here the trial examiner's deduction that respondent was the motivating factor affords a logical explanation buttressed by cogent evidence.

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[6]In this court respondent obliquely makes the belated assertion that even if it caused Cascade to discharge Carlson because of his lack of union membership, it was privileged to do so under the union security provision contained in the collective bargaining agreement. However, as noted in the body of the opinion, this defense was not formally tendered or treated as an issue at any stage of the administrative proceeding and no justification for the tardy attempt has been made or suggested. It would be improper to consider the contention, if it be such, here. See sections 10 (e) and (f), National Labor Relations Act; NLRB v. Bradford Dyeing Assn., 310 U.S. 318 (1940); NLRB v. Cheney California Lumber Co., 327 U.S. 385 (1946); NLRB v. Giustina Bros. Lumbering Co., 253 F.2d 371 (9th Cir. 1958).

Respondent, however, insists that the examiner should not have attributed significance to the fact that Carlson's replacement was a union member. It points out that Cascade, under its contractual arrangements with respondent, was obliged to employ an applicant who possessed the most experience in the particular type of work, regardless of his union or non-union status; and it argues that if Todd did make the statement attributed to him regarding union men being out of work, "it cannot be said that he was not referring to the fact that there were 'sufficient available, qualified persons. . . . to meet the employment requirements of the Producer' at the time that Cascade hired Carlson in the first place as a new employee without any Industry seniority." There are at least two adequate answers to that argument: first, that it was for the finder of fact to interpret the remark; second, that there was no proof whatever that the replacement's experience in the particular craft and classification of work was superior to that possessed by Carlson.

Respondent's second ground of attack presents for review several rulings of the Tax Court and the Board regarding the admission of evidence.

Carlson was allowed to testify concerning a visit to respondent's offices in May 1956 and again in September 1957; respondent's objection was that the testimony was immaterial and too remote in view of the admitted fact that Carlson was hired by Cascade and his employment commenced in April 1948. In overruling the objection the trial examiner stated that this testimony was offered "as background evidence which would shed light on the more proximate conduct of the parties"; the Board denied respondent's exception. At best the

proof anticipated a defense but since the respondent offered no defense the proof was improper and the ruling was error. But the result was patently innocuous.

On the premise that Carlson's testimony consisting of Loftus' statement that "he [Loftus] was very sorry that he had the union on his back and was forced to let me go by the end of the week" was hearsay, the respondent urges that its objections to that testimony and other similar testimony given by the witness Selson should have been sustained. Respondent observes in its brief that "[i]n receiving such hearsay testimony and permitting it to stand, over exceptions, the trial examiner and the Board assert that it is all 'direct evidence' addressed to establishing that Carlson was discharged by the company in violation of section 8(a)(3) of the Act . . . ." Respondent argues that "[t]his reasoning ignores the fact that such alleged conversation might constitute 'direct evidence' in an 8(a)(3) proceeding against the Company, but constitute objectionable hearsay when introduced against the Union to prove the truth of the statements supposedly made by the employer in an 8(b)(2) case." However, this argument overlooks the nature of the violation charged and the limited purpose for which the proof was admitted. Petitioner correctly notes elsewhere in its brief that the charge that the union caused the employer to discharge his employee is "derivative" and thus required proof, if it was to be sustained, of the employer's unlawful discrimination against its employee, as well as proof that a particular labor organization caused the employer to so discriminate. Radio Officers' Union v. NLRB, 347 U. S. 17 at 53; NLRB v. International Longshoremen's & Warehousemen's Union, 210 F. 2d 581 (9th Cir. 1954). In

this proceeding the testimony was admitted by the trial examiner and considered by both him and the Board not to prove petitioner's coercion of employer discrimination but solely to establish the fact that Cascade had engaged in conduct which would violate section 8(a)(3). So limited, the admission and consideration of the testimony was proper.

The final matter for review under respondent's second ground stems from the admission of an exhibit. During redirect examination as a witness for the General Counsel Loftus expressed doubt that Todd had requested or directed him to discharge Carlson. The witness was then confronted with a document which he identified as his prehearing statement given to a Board agent. Therein appeared the witness' declaration that Todd had "advised [him] . . . to let Carlson go." The document was admissible to impeach the witness but clearly could not be used to establish the truth of the fact stated. NLRB v. Quest-Shon Mark Brassiere Co., Inc., 185 F. 2d 285 (2d Cir. 1950). The trial examiner, over respondent's objection, admitted the exhibit "for the purpose for which it is offered"; but due to the confused state of the record with respect to the scope of the offer, the trial examiner's ruling is at best ambiguous. Respondent urges that this exhibit was erroneously employed by the examiner, thus tainting the findings because the Board "simply adopt[ed] the trial examiner's ultimate findings summarily." There is no warrant in the record for this charge. The Board did not abdicate its fact finding duty; on the contrary, it was not only quick to recognize that the trial examiner might have erred but gave respondent the benefit of that doubt and expressly noted that its own finding

on the issue was based upon evidence other than the exhibit.

Respondent's attack on the form of the order is premised on the contention that the remedy prescribed by the Board is (a) excessive and (b) inequitable.

Certain of the provisions contained in the order clearly come within the first category. Thus the Board in a sweeping direction commands respondent to cease and desist from causing or attempting to cause not only Cascade but "any other employer" to discharge, terminate "or in any other manner" discriminate against employees in violation of the Act. There is no suggestion that respondent was similarly involved with any other employer than Cascade, nor that the particular unfair labor practice consisted of any proscribed conduct other than that charged. The quoted portions of the order are, as respondent urges, indefinite, beyond any issue properly before the Board and unwarranted by the evidence; they should be stricken. Communication Workers of America v. NLRB, 362 U.S. 479 (1960); Morrison-Knudsen Co. v. NLRB, 276 F. 2d 63 (9th Cir. 1960).

The order further directs respondent to notify Cascade that it has no objection to Carlson's employment, to request Cascade to offer him reinstatement "to the position he formerly held" even if dismissal of an incumbent is necessary to make room for him and to compensate him for loss of pay in accordance with the Woolworth formula. (F. W. Woolworth Co., 90 NLRB 289 (1950). The Board, says respondent, in imposing these affirmative requirements upon it, acted arbitrarily and overlooked or deliberately ignored the undisputed evidence that the position Carlson occupied was a tem-

porary one and also failed to take into consideration that his eligibility, in any event, is governed by the industry-wide seniority agreement and that he was subject to discharge under the union security provision of the collective bargaining agreement between Cascade and respondent.

There is no merit in any of these attacks. The Board possesses the power "to undo the effects of discrimination" (Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 189 (1941)) and this order goes no further than to exercise that power within the limits of the supported findings.

Respondent, likewise, is unduly critical of the provisions requiring it to clear the way for Carlson to regain employment at Cascade and reimburse him for back pay.

Orders containing provisions identical to those appearing in the one under consideration but directed to employers have been interpreted in the light of the nature of the work and the existence of the particular position. Thus in NLRB v. C. Nelson Mfg. Co., 120 F. 2d 444, 446 (8th Cir. 1941) the Eighth Circuit, speaking of such an order, said:

> "The employment of the men was seasonal and the order of the Board cannot be construed to mean that the four men must be furnished employment at a period when no employment is available. Nor does the order mean that the employees are to be paid wages for the entire period that has elapsed since their discharge. The plain meaning of the order is that the four men are to be restored to their former positions and given work when

other like employees are given work, and the back pay that shall be paid them is measured by what they would have earned during the period if they had not been discharged, taking into account the seasonal character of the business."

This is also the position of the Fourth Circuit in NLRB v. Planters Mfg. Co., 106 F. 2d 524 (1939). True, the jobs in both cases were seasonal as against work which here was shown without dispute to be temporary, and there employers, rather than labor organizations, were the ones to whom the orders were given, but we perceive nothing in those differences or in this record that would prevent this court from similarly construing the order under review.

We construe the Board's order here to do no more than direct respondent to withdraw its objection to Carlson's return to the particular job he formerly held and to refrain from any retaliation against Cascade if in the process Cascade discharges anyone who now occupies that position. What Cascade's reaction and response may be is no concern of respondent.

That the order does not fix the precise amount to be paid Carlson affords respondent no basis for valid complaint. We agree with the Fourth Circuit that:

"General orders of this sort entered by the Board with respect to back pay and reinstatement manifestly contemplate further administrative action on its part, i.e. determination of the exact amount of back pay to be tendered and determination as to what positions are available and substantially equivalent for the purposes of the reinstatement ordered. Such general orders are analogous to interlocutory

judgments of courts fixing liability but leaving for future determination questions as to amount of liability; and our decrees affirming or enforcing them are analogous to our affirmance of interlocutory judgments on appeal. After the general order of the Board for back pay and reinstatement is affirmed or ordered enforced by us, the Board must work out the details of reinstatement and of the amounts to be paid as back pay under the general provisions of the order. This can ordinarily be done by negotiation; but, if controversy arises, the facts must be found by the Board, the body to which Congress has committed the administrative process."

Home Beneficial Life Ins. Co. v. NLRB, 172 F. 2d 62, 63 (1949).

The order of the Board, modified in accordance with the view herein expressed and as interpreted by this opinion, will be enforced. Respondent's petition is DENIED.

(Endorsed) Opinion Filed May 10, 1962.

Frank H. Schmid, Clerk.

APPENDIX C.

Decree of the United States Court of Appeals for the Ninth Ciruit.

National Labor Relations Board, Petitioner, v. Local 776, IATSE (Film Editors), Respondent.

Local 776 (Film Editors), Petitioner, v. National Labor Relations Board, Respondent. No. 16,907

DECREE APPROVED:

Stanley N. Barnes
M. Oliver Koelsch
U S Circuit Judges

Leon R. Yankwich
U S District Judge.

(Endorsed)—Filed Jul 2—1962. Frank H. Schmid, Clerk.

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Before: Barnes and Koelsch, Circuit Judges, and Yankwich, District Judge.

THIS CAUSE came on to be heard upon petition to enforce and cross-petition to review an order of the National Labor Relations Board issued by it on September 4, 1959, against Local 776, IATSE (Film Editors), its officers, representatives, agents, successors, and assigns. The Court heard argument of counsel on January 10, 1961, and has considered the briefs and transcripts of record filed in these proceedings. On May 10, 1962, the Court being fully advised in the premises handed down its opinion granting enforce-

ment of the Board's order as modified and denying the petition to review. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that Local 776, IATSE (Film Editors), its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Cascade Pictures of California, Inc. to discharge, terminate or discriminate against employees in regard to hire or tenure of employment, or any term or condition thereof, except as authorized by Section 8 (a) (3) of the National Labor Relations Act, as amended (hereinafter called the Act).

(b) Restraining or coercing employees or prospective employees of Cascade Pictures of California, Inc., its successors or assigns, in the exercise of their right to engage in, or to refrain from engaging in, any and all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Notify the Company in writing, and furnish a copy to Henry A. Carlson, that the Union has no objection to the reinstatement of Carlson to his former position as an apprentice film editor at the laboratory of the Company without regard to his membership or nonmembership in the Union, or any other labor organization, and without prejudice to his seniority, or other rights and privileges.

(b) Make whole Henry A. Carlson for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the Opinion of the Court.

(c) Post in conspicuous places at the business office of the Union copies of the notice attached as Appendix A. Copies of said notice to be furnished by the Regional Director for the Twenty-First Region (Los Angeles, California), shall, after being duly signed by the Union, be posted by it immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that the notices are not altered, defaced or covered by any other material.

(d) Furnish to the aforesaid Regional Director signed copies of the notice attached hereto as Appendix A for posting by Cascade Pictures of California, Inc. it being willing, at places where it customarily posts notices to its employees.

(e) Notify the Regional Director within ten (10) days from the date of service of this decree what steps the Union has taken to comply herewith.

Endorsed, Decree Filed and Entered

/s/ Frank H. Schmid
Frank H. Schmid
Clerk

A TRUE COPY

ATTEST:
Frank H. Schmid
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 281

LOCAL 776, I.A.T.S.E. (FILM EDITORS), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5–18) is not yet reported. The Board's decision and order (R. 10–14) [1] are reported at 124 N.L.R.B. 842.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5–18) was entered on May 10, 1962, and a decree was entered on July 2, 1962 (Pet. App. 19–21). The petition for a writ of certiorari was filed on July 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the printed record filed with the court below.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Union caused the discharge of an employee because he was not a Union member, in violation of Section 8(b)(2) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Petition (Pet. App. 1–4).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In May 1956, the Company [2] and petitioner Union [3] executed a collective bargaining agreement effective to January 30, 1960, which required employees working in "union" classifications to join the Union 30 days after being hired (R. 16; 192, 194, 196). In September 1957, Henry Carlson obtained work in the Company's editorial department "breaking down" filmed television commercials (R. 19; 47–48). Sometime in May 1958, an employee informed Bernard Loftus, the Company's head film editor, that Carlson was not a member of the Union (R. 25; 105–106).[4] Loftus so notified the Union's assistant business representative, William B. Todd; Loftus also inquired of Todd whether Carlson's job was under the Union's jurisdic-

[2] Cascade Pictures of California, Inc., a producer of commercial television films (R. 14–15).

[3] Local 776 (Motion Picture Film Editors), International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada.

[4] Carlson had inquired about Union membership both before (R. 18, 23; 51, 82–83) and immediately after being hired by the

tion (R. 25; 106). Thereafter, Loftus told Carlson that he was "very sorry," that he "had the Union on his back" and that he was "forced to let [Carlson] go by the end of the week" (R. 19–20; 10, n. 3; 53–55).

Carlson reported this conversation to Lester Selson, his supervisor (R. 20; 55). Selson, in Carlson's presence, called Todd at the Union office, told Todd that Carlson was a valuable man, and asked him whether an arrangement could be worked out with the Union to permit Carlson to stay on (R. 20; 56–57). Todd told Selson that he would come over to the film department to investigate the matter (R. 20; 57).

Two or three days later, Carlson noticed Todd and Selson in Selson's office, and joined them. Selson told Todd that he had "some question" whether Carlson's job—"breaking down" film—came under the Union's jurisdiction; that Carlson's ability to speak several foreign languages made him "especially useful" to the Company in its dealings with foreign concerns; and that, if Carlson were to be laid off, the Company would have to train someone else "from scratch" (R. 20–21; 62). Todd replied that the Union had jurisdiction over Carlson's job because he handled film, and that the Company should blame itself for any inconvenience in training another man for Carlson's job because "the Union had members out of work" and

---

Company. On the latter occasion he was informed at the Union's office that the Union did not strictly enforce the 30-day period and would call him when it came time to process him into membership. Two or three weeks later the Company laid him off for lack of work, and he was not called back to work until April 1958 (R. 19; 81, 51, 72, 53).

Carlson should not have been hired "in the first place." Todd added that he did not have the "final say so" in the matter, that he would "check with his superiors," and that he would let Carlson know about their decision (R. 21; 62).

Several days later, Todd told Carlson at the Union's office that "his superiors" had concluded that the Company had broken its contract with the Union, that the Union could "fine" the Company for a sum equal to Carlson's earnings in its employ, but that, because of "unusual conditions," it had been decided that it would be "better to discontinue [Carlson's] employment at Cascade" (R. 22; 63–65). Todd then remarked that, while the Union was under no "legal obligation to do anything for [Carlson]," he felt "a moral obligation * * * to make up for the job [Carlson] had lost" and therefore that he would get Carlson "a summer job at ABC" (R. 22; 65).

Meanwhile, Todd advised Loftus that Carlson's work fell under the Union's jurisdiction (R. 25; 164). The Company then hired Peter de Turczynowicz, a Union member referred by the Union's office (R. 23; 65–66, 183). On May 23, after de Turczynowicz had become familiar with Carlson's duties, Loftus discharged Carlson, effective May 30, 1958 (R. 23; 66). According to Loftus, Carlson's lack of Union membership was "the only reason" for his discharge (R. 25; 115).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that the Union violated Section 8(b)(2) and 8(b)(1)(A)

of the Act, 49 Stat. 452, as amended, 61 Stat. 140, 29 U.S.C. 158(b)(2) and 158(b)(1)(A), by causing the Company to discharge Carlson because he was not a Union member (R. 3[illegible]).[5] The Board's order required the Union to cease and desist from the unfair labor practice found. It also directed the Union to notify the Company and Carlson that it had no objection to Carlson's employment despite his lack of Union membership, to request the Company to reinstate Carlson to his former position, to make Carlson whole for wages lost as a result of the discrimination against him, and to post appropriate notices (R. 10–12).

C. THE DECISION OF THE COURT OF APPEALS

The court below upheld the Board's unfair labor practice finding as supported by substantial evidence, and, with a modification not here relevant, enforced the Board's order (Pet. App. 15, 18).

ARGUMENT

Although there was a union-security provision in the contract between the Company and the Union requiring employees to become Union members after 30 days of employment (see p. 2, *supra*),[6] that provision is not material to this case, for the Union did not invoke it in effecting Carlson's discharge or in defending against the Board's complaint (R. 10, n. 3; Pet. App. 10–11, n. 6); nor does the Union rely on that provision in its petition. The only question

[5] No charge was filed against the Company, and the Board made no unfair labor practice findings against it.

[6] A proviso to Section 8(a)(3) of the Act, 49 Stat. 452, as amended, 29 U.S.C. 158(a)(3), permits such agreements.

presented is whether substantial evidence supports the Board's finding, sustained by the court below, that the Union caused the Company to discharge employee Carlson because he was not a member of the Union.[7] Petitioner contends that the finding is not so supported because (i) a crucial element of the Board's case—*viz.*, that Carlson's lack of Union membership was the motive for the Union's action in procuring his discharge—rests solely upon evidence that is hearsay as to the Union,[8] and (ii) Section 10(b) of the Act bans the use of such hearsay evidence.[9]

[7] Section 8(b)(2) of the Act makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." Section 8(a)(3), in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." The employer need not be a party to the proceeding to permit a finding that the union has violated Section 8(b)(2), for that section "requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8(a)(3)." *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 52–54.

[8] This consists of Carlson's testimony that, about a week before his discharge, Film Editor Loftus said that he would have to let Carlson go because "he had the Union on his back," and that Supervisor Selson, in Carlson's presence, phoned Union official Todd and asked whether the Union could work out some arrangement whereby Carlson could be retained (see pp. 3, 4–5, *supra*).

[9] Section 10(b), 49 Stat. 453, as amended, 29 U.S.C. 160(b), provides in relevant part that: "Any such [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934. * * *"

This issue does not warrant review by this Court, for, as we shall show below, there is sufficient evidence apart from the hearsay evidence to support the Board's unfair labor practice finding; and, in any event, the receipt and use of the latter evidence in the circumstances of this case was entirely proper and did not contravene Section 10(b).

1. Indisputably competent evidence summarized in the Statement (pp. 2–5, *supra*) clearly demonstrates the Union's part in effecting Carlson's discharge. It shows that, when the Company's head film editor, Loftus, learned that Carlson was not a Union member, he promptly asked the Union to advise him whether Carlson's particular job was under the Union's jurisdiction. The Union thereupon sent its business representative, Todd, to review the work being done by Carlson. Todd stated his opinion that the Union had jurisdiction over Carlson's job, and that the Company had itself to blame for any "inconvenience" suffered by Carlson's discharge because it should not have hired him "in the first place" while "the Union had members out of work." Following this conversation, Todd notified Loftus that Carlson's work did come under the Union's jurisdiction, and supplied a Union man, de Turczynowicz, to replace Carlson. A few days later, when de Turczynowicz had become familiar with Carlson's duties, Loftus discharged Carlson. Todd, meanwhile, promised Carlson "a summer job at ABC" because he felt "a moral obligation * * * to make up for the job [Carlson] had lost" with the Company. The possibility that the Company might have had any other reason for discharging Carlson was negated by

the evidence that Selson, Carlson's immediate superior, told Todd that Carlson's knowledge of several languages made him "especially useful" to the Company in dealing with foreign customers and that the Company would have to train another man "from scratch" if it let Carlson go. Upon this evidence alone, and without regard to the evidence hereafter discussed, we submit that the Board could properly find, as it did, that the Union had caused Carlson to be discharged for the reason that he was not a Union member.

2. In any event, the Board's use of Carlson's testimony concerning his conversations with Loftus and Selson (see note 8, *supra*) was not contrary to the requirement in Section 10(b) of the Act (see note 9, *supra*), that the Board shall "so far as practicable" adhere to the rules of evidence applicable in the federal district courts. Although petitioner does not deny that Carlson's testimony that Company representatives stated that they discharged him because of the Union would be admissible as evidence of motive in a proceeding brought against the Company,[10] it contends that it is objectionable hearsay evidence when relied on for any purpose in a proceeding against the Union (Pet. 17, 26–27). Contrary to petitioner's assumption, the requirement in Section 10(b) does not completely rule out the use of hearsay evidence, particularly where, as here, it is corrobo-

[10] See *National Labor Relations Board* v. *Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 860 (C.A. 9); *National Labor Relations Board* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 942–943 (C.A. 3).

rated by other evidence."[11] Moreover, the court below properly concluded (Pet. App. 14) that, since Carlson's testimony was utilized by the Board, not to prove that the Union had caused him to be discharged, but for the "limited purpose of establishing the Company's motive and reason for discharging Carlson" (R. 9, n. 2, 31–32)—a relevant issue, as the court below held (Pet. App. 13)—it was admissible under the rules of evidence applicable in the courts. It is well settled that a third party's statements of his reasons for taking certain action, though hearsay, are properly admissible to prove the state of mind of the declarant if that be in issue in a proceeding involving another party. See *Lawlor* v. *Loewe*, 235 U.S. 522, 536; *Garford Trucking Corp.* v. *Mann*, 163 F. 2d 71, 73 (C.A. 1), certiorari denied, 332 U.S. 810; *Greater New York Live Poultry C. of C.* v. *United States*, 47 F. 2d 156, 159 (C.A. 2); *American Cooperative Serum Ass'n* v. *Anchor Serum Co.*, 153 F. 2d 907, 912 (C.A. 7); *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 483 (C.A. 3); 6 Wigmore, *Evidence* §§ 1714, 1729, 1789, 1790 (3d ed. 1940). Cf. *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55, 65.[12]

3. None of the cases relied on by petitioner is in-

[11] See *National Labor Relations Board* v. *Imparato Stevedoring Corp.*, 250 F. 2d 297, 302–303 (C.A. 3).

[12] It should also be noted that petitioner was afforded an opportunity to test the reliability of Carlson's testimony by cross-examining Loftus and Selson, who were witnesses in the Board proceeding. And, Loftus, who was subjected to a rigorous direct and cross-examination, conceded that Carlson's lack of Union membership was "the only reason" for his discharge (p. 4, *supra*).

consistent with the foregoing. In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229–230 (Pet. 18–20), this Court condemned reliance upon "mere uncorroborated hearsay or rumor"; as we have shown, the hearsay here was corroborated by other evidence (see pp. 4, 7–8, *supra*); and, indeed, it was admissible independently under a recognized exception to the hearsay rule (see p. 9, *supra*). Similarly distinguishable are the three Ninth Circuit cases cited by petitioner (Pet. 21–23) in which evidence was found to be hearsay and insufficient to support the Board's findings; in those cases, unlike here, the hearsay evidence was uncorroborated by other evidence and was, moreover, relied on to establish more than just motive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1962.

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